Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

A.J. WREN and JERRY WREN,

Petitioners,

against

JIM TOWE; JAY NORRIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May § 1983 defendants claiming entitlement to the defense of qualified immunity make use of evidence obtained in violation of the Fourth Amendment in making their assertion of the defense?

2. May a court grant qualified immunity to a police officer defendant who made a seizure of a motor vehicle in the absence of probable cause or warrant or exigent circumstance?

3. May a Court of Appeals assume jurisdiction of an interlocutory appeal of a denial summary judgment proceeding concerning qualified immunity when there are contested facts material total rendition of a decision?

4. May a court and/or a § 1983 defendant lawfully ignore or violate F.R.C.P. 56 and use contested facts in a summary judgment proceeding to support a police officer's claim to qualified immunity?

5. Is a police officer who makes a warrantless seizure of property, required to justify his seizure to a magistrate by submitting an oath or affirmation stating probable cause for the seizure?

6. May a police officer who makes a seizure of property and then submits a conclusionary affidavit to a magistrate and then compounds the situation by the use of false testimony escape liability to the owner of the property in a § 1983 claim for wrongful seizure?

PARTIES TO THIS PROCEEDING

The parties to this proceeding are as follows:

A.J. Wren	Plaintiff-Petitioner
Jerry Wren	Plaintiff-Petitioner
Jim Towe	Defendant-Respondent
Jay Norris	Defendant-Respondent
Douglas R. Larson	Counsel for Plaintiffs-Petitioner
Seth Byron Dennis	Counsel for Defendant-Respondent
Brett Govett	Counsel for Defendant-Respondent

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PETITION FOR WRIT OF CERTIORARI

A.J. and Jerry Wren ("Wrens") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 30, 1997 and the denial of requests for rehearing on February 19, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is found at 130 F.3d 1154 (1997). It is reprinted in Appendix A hereto ("App. A"). By order filed February 19, 1998, the Fifth Circuit denied the petition for rehearing and suggestion for rehearing en banc ("App. B"). The District Court's Opinion is reproduced in the Appendix ("App. C").

STATEMENT OF JURISDICTION

Petitioners file this petition for writ of certiorari seeking review of the Court of Appeals for Fifth Circuit's opinion and judgment, reversing the district court's judgment. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2106 to review on a writ of certiorari Court of Appeals the Fifth Circuit's and District Court's judgments.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case. U.S. Const. amendment IV; U.S. Const. amendment XIV, § 1; 42 U.S.C. §§ 1983 and 1988 (1994).

STATEMENT OF THE CASE

1. Statement of Facts

The Petitioners are A.J. Wren and Jerry Wren ("the Wrens"). The Wrens are father and son owners of a used car dealership located in Fort Worth, Texas, named S & W Auto Sales. On March 30, 1994, A.J. Wren and Jerry Wren purchased a 1991 "reconditioned" Chevrolet pickup truck from another used vehicle dealership. After purchase, Jerry Wren elected to personally use the truck, Jerry Wren's wife, Jennifer, frequently drove the truck.

The Respondents either are or claim to be police officials. Respondent Jim Towe is a police officer with the Texas Department of Public Safety and Respondent Jay Norris is a retired police officer who was formerly with the Louisiana State Police and in this litigation claimed to be assigned as a "Special Texas Ranger" to the Dallas, Texas Federal Bureau of Investigation Auto Task Force.

According to the Respondents, the Petitioners' truck was discovered on a public parking lot in Fort Worth, Texas on January 17, 1995. On this occasion one of the Respondents took note of the license tag on the Petitioners' truck and noticed that a number originally placed on the dash board by General Motors referred to as a "VIN" (vehicle identification number) was missing. The

Respondents claim that the absence of this "VIN" led first, Norris, and then later Towe, in conjunction with other factors, to conclude that they had "probable cause" to seize, without benefit of warrant or exigent circumstance, the Petitioner's truck. This "seizure" occurred almost two months later, on March 16, 1995.

A vehicle identification number or "VIN" is a combination of letters and numbers placed on a vehicle by the vehicle's original manufacturer. In most states, when a Certificate of Title is created, this "VIN" becomes the official number or the "serial number" assigned to the vehicle. Texas is one of the states that frequently, but not always, uses the manufacturer's VIN as the vehicle's official serial number. In Texas, a number totally different from the manufacturer's number can be used when a vehicle is classified as a "reconditioned" vehicle. When Texas assigns a new "serial number" to a "reconditioned" vehicle, this number is placed only on the driver's side door jamb.

A "reconditioned" truck is a vehicle constructed of parts taken from damaged and/or salvaged vehicles. Sometimes "new" parts are used as well. After such a vehicle is constructed in order to become eligible for sale and/or use, the "reconditioner" is required to ask the Texas Department of Transportation for a "new" certificate of title and, if necessary, for the assignment of a "new serial number". A vehicle constructed from other vehicles will likely not have manufacturer originated Vehicle Identification Numbers (VIN's) on its parts where new vehicles have them and almost invariably will not have parts with VIN's consistent with one another. Texas Department of Transportation procedures and forms

require the "reconditioner" provide a description of the component parts used to construct the vehicle and provide the original manufacturer's VINs found on the major components used in the process. The frame (chassis), transmission, engine and some other parts have numbers placed on them by the original manufacturer. The Department of Transportation forms coupled with the receipts, invoices, cancelled checks, etc. generated with the purchase of parts used in the construction of the reconditioned vehicle are then presented to a law enforcement officer. The law enforcement officer then conducts an inspection of the vehicle and compares the receipts, etc. with the Application for Title, etc. and manufacturer's VINs remaining on the vehicle itself. The purpose of this inspection is to satisfy the State of Texas that there was a legitimate and lawful source of the components used in the vehicle's reconstruction. After this inspection the officer certifies his inspection and then the Texas State Department of Transportation, if necessary, assigns a new "serial number". A new Certificate of Title for the "reconditioned" vehicle is created as well. This "new" Certificate of Title reflects on the face of the title that the vehicle is "reconditioned". The Texas Department of Transportation maintains records of the reconditioning process, including the inspection and maintains records of the vehicles used in the recondition process. These records are referred to as the reconditioned vehicle's "title history".

After Towe and Norris seized the plaintiff's truck on March 16, 1995, Towe presented a conclusionary affidavit concerning the seizure to a Texas Justice of the Peace. This affidavit stated only that the Petitioners' truck had

been seized and that the Respondents requested the Justice of the Peace to allow the F.B.I. Task Force to hold the vehicle. No factual basis justifying a seizure was presented in this affidavit.

Shortly thereafter, the Petitioners sought from the Justice of the Peace, an order for the return of their truck to them. On April 14, 1995, the Justice of the Peace held a hearing.

At this hearing the Petitioners, Jerry Wren and his wife, Jennifer, heard Towe and Norris testify to several matters about the truck that did not comport with their knowledge of the facts and their knowledge of the truck's history. During the hearing Towe and Norris said the cab on the truck was not "legitimate" and that the cab did not have evidence of body repair. Jerry Wren and his wife knew this was a misrepresentation of the truth and demanded that an inspection on the truck occur because they could demonstrate that there was indeed clear evidence of body repair to the truck that could be easily demonstrated. The Justice of the Peace refused to allow or to conduct this inspection and despite the Wrens' protestations to the Justice of the Peace that Towe and Norris were not telling the truth about their basis for seizure, the Justice of the Peace awarded the truck to the Respondents and/or the State of Texas. The Petitioners perfected appeal from the Justice of the Peace's ruling and hired counsel. On August 23, 1995 a lawyer from the Texas Attorney General's office who represented Towe and the State of Texas consented to the entry of a judgment requiring the return of the truck to the Petitioners. The Petitioners, thusly, regained their truck on August 23, 1995.

This litigation was brought to recover damages for the initial seizure, the deprivation of the truck from March 16, 1995 until August 23, 1995 and for physical damages inflicted on the truck by the Respondents. (R. 122-127, 158). After this litigation was initiated the Respondents in their answers claimed entitlement to the defense of qualified immunity. Later in motion for summary judgment claiming qualified immunity, Norris and Towe claimed that the following gave them probable cause to seize the Petitioners' vehicle on March 16, 1995:

A. No dashboard Vehicle Identification Number (VIN);

B. The Petitioners' vehicle was registered to a dealer and did not exhibit dealer license plates (the Petitioners' business, S & W Auto Sales);

C. The 1991 truck was in excellent condition and did not appear to Norris or Towe to be a salvage vehicle.

D. The truck had been assigned a new serial number by the State of Texas;

E. The truck (when a former owner (McGee) had it) had been rendered a total loss and then was used in the construction of the Petitioners' truck. (R. 90-97; 73-89.)

F. According to Norris, another former owner (Searcy) told Norris that the cab used in the construction of the Petitioners' truck was too extensively damaged for use in the construction of the Petitioners' truck; that the doors on the Petitioners' truck were not sold to the builder of the Petitioners' truck; and, that the parts used in the construction

process were subject to a lien that Searcy had not satisfied.

The Respondents also in their summary judgment motion claimed that other factors, discovered after their (presumptively) March 16, 1995 illegal seizure of the Petitioners' truck, justified their seizure as well. The officers said the glove compartment contained no VIN; that the doors on the truck, contrary to statements they attributed to a former owner of the truck's cab (Searcy), were from Searcy's truck; and, that other unspecified "identifiers" and "numbers" were not consistent with a "legitimate" truck.

The summary judgment evidence presented by the Petitioners demonstrated that the Respondents' insinuations that the truck was built with illegitimate parts were nothing less than distortions of the true facts and were lies or misrepresentations. The Petitioners' summary judgment evidence showed that the Respondents had either materially distorted or lied about conversations the Respondents had with the other prior owners of the salvaged vehicle used in the construction of the Petitioners' truck. The Petitioners presented an affidavit from one of Respondents' sources of evidence of illegal conduct, a Mr. Searcy, who the Respondents claimed gave them reasons to "believe" that parts of the truck were not "legitimate". In an affidavit Searcy denied telling the Respondents anything that would give them a basis for claiming that the body and doors on the petitioners' truck were not legitimate. Searcy said he had paid for the truck in effect denying that there was an outstanding lien. In his affidavit, Searcy also said he told Norris that the VIN

on the dash had probably been removed by him. Petitioners also presented an affidavit from the police officer (DeSoto, Texas Police Lt. Paul Pothen) who inspected the truck after it was reconditioned as well as an affidavit from the truck's "reconditioner", a Randy Brown, co-owner of a business known as Texas Custom Trucks. These affidavits and others demonstrated that there was no basis to believe seizure was either indicated or appropriate or necessary. The Petitioners' evidence was that there was nothing to indicate that the truck was anything but a legitimate reconditioned truck.

Before March 16, 1995, the Respondents had obtained release of the records on title history from the Texas Department of Transportation regarding the Petitioners' truck. This "title history" included records of the vehicles used to recondition the Petitioners' truck. This "history" indicated that two salvaged vehicles had been used to build the Petitioners' truck. An examination of these records establishes that undamaged parts from two legitimately obtained salvage vehicles had been used to build the Petitioners' truck. The Respondents offered nothing that showed or tended to show that the two trucks reflected in the "title history" were not actually the trucks used in the "reconditioning" of the Petitioners' truck.

Much of the Respondents' summary judgment contentions did not actually indicate anything unusual or indicative of illegal conduct were present. Neither Towe nor Norris ever explained how it was an indication of illegal conduct for a dealership to own a vehicle and then elect to not use dealer license plates. An explanation as to why Respondents claim truck did not look like a salvage vehicle was indicative of illegal conduct was not given as

well. A "reconditioner" would be expected to ensure that an excellent effort at concealing body repairs was made. At best the Respondents' contentions merely show that a "dealer" (the Petitioners A.J. Wren and Jerry Wren) owned a vehicle that was rebuilt or "reconditioned" from truck components that were taken from two damaged trucks and that what became the Petitioners' truck was reconstructed by someone (Randy Brown/Texas Custom Truck Sales) who was skilled in the rebuilding or reconstruction process, otherwise the truck would reveal obvious evidence of prior damage. (After Petitioners purchased the truck, they improved the vehicle's appearance with a $2,150.00 custom paint and body procedure and added other equipment to the vehicle. These improvements were made by Petitioners in April, 1994.) (R. 12, 30.)

The Petitioners' summary judgment evidence established that the "reconditioned" truck was constructed in March, 1994 by Randy Brown with Texas Custom Truck Sales from two Chevrolet trucks formerly owned by two individuals named McGee and Searcy. The Petitioners' affidavits and the truck's title history showed that the chassis/frame, engine and transmission from McGee's truck coupled with the 1989 body (with doors) from what was formerly Searcy's truck were used to build what became the Petitioners' "reconditioned" truck. The Petitioners' summary judgment evidence showed that the Petitioners' truck was entirely consistent with the Texas Department of Transportation "title history" that the Respondents had obtained before their seizure. The title history showed that the damaged components from

McGee's former truck were not used in the reconditioning process. The evidence and title history showed that the "McGee" truck was purchased by Brown/Texas Custom Truck Sales from a broker in motor vehicles (Prestige Auto Brokers) after the McGee's insurance carrier had paid McGee an insurance claim and then sold the burned McGee truck to "Prestige". Brown had purchased the truck's cab and doors from Donnie Thomas who in turn had obtained it from a William Searcy. (Body components on Chevrolet pickup trucks from 1988 to 1997 are interchangeable.) The Petitioners' summary judgment evidence showed that on March 29, 1994 Texas Custom Truck Sales/Brown, submitted the Petitioners' truck to a DeSoto, Texas police lieutenant, Paul Pothen, for the state mandated – for inspection. The Petitioners' summary judgment evidence also confirmed in the truck's title history showed that Pothen had carefully inspected the truck and certified that the truck was legitimate and not built with illegitimate or stolen parts. These Forms evidencing the "reconditioning process" are part of the title history to the Petitioners' reconditioned vehicle. Towe and Norris had obtained this "title history" shortly after they became aware of the Petitioners' truck on January 17, 1995. Because of "title history", Towe and Norris knew before their seizure on March 16, 1995, the complete history of the Petitioners' truck and knew about police Lt. Pothen's inspection and knew that the truck had been classified as "reconditioned". Additionally, the Respondents knew before their seizure that in March 1994 a "new serial number" had been assigned to the Petitioners' truck and the Respondents knew before their March 16, 1994 seizure that the truck's "serial number"

would not be found on the dashboard but rather would be affixed to the driver's side door jamb of the Petitioners' vehicle. This factor alone should destroy any claim from the Respondents that the missing VIN from the dash of the Petitioners' truck indicated anything illegal or improper. (R. 122-127; 73-97.) Contrary to the Court of Appeals' opinion, the term "VIN" or "Vehicle Identification Number" and "serial number" are not always interchangeable terms. The applicable Texas Statute which makes it a crime to remove a serial number is not applicable to the facts of this case. There is no evidence that the "serial number" assigned by the Texas Department of Transportation and placed on the door jamb of the Petitioners' truck by the State of Texas was removed, obliterated or altered. See § 501.003 (18) and § 501.158 of Texas Trans. Code; found in the Appendix D and E.

Because of the trucks "reconditioned" status and the title history, Towe and Norris would have to know that an inspection by either of them would reveal that not all of the factory imprinted VIN's would be found on the Petitioners' truck and that there would be inconsistent VIN's on the parts found on the Petitioners' truck. A "reconditioned truck" is by definition a truck constructed from parts cannibalized from other sources and/or other trucks, these factors could not be without more, evidence of anything illegal.

The Respondents also claimed that the reconditioner of the Petitioners' truck, Randy Brown, was under investigation as an operator of an illegal "chop shop" but the Respondents offered no evidence justifying any belief that Randy Brown had ever been involved in an illegal "chop shop". Randy Brown was a confidential informant

in unrelated matters for the DeSoto police officer Lt. Paul Pothen. Pothen was the police officer who inspected the truck before the new serial number and the "new title" for the Petitioner's truck was sought after it had been reconditioned. The Respondents offered no evidence that showed or tended to show that this relationship produced any reason to suspect some illegal act had occurred.

2. Basis of Federal Jurisdiction in Court of First Instance

Jurisdiction in the court of first instance, the United States District Court for the Northern District of Texas, Dallas Division, is based on 28 U.S.C. § 1331; 28 U.S.C. § 1343(a); and 28 U.S.C. § 1343(b).

REASONS FOR GRANTING THE WRIT

I. THE DETERRENCE ACHIEVED BY THE "EXCLUSIONARY RULE" SHOULD PREVENT THE USE BY POLICE OFFICERS OF INFORMATION OBTAINED IN VIOLATION OF FOURTH AMENDMENT CRITERIA TO ESTABLISH THEIR ASSERTION OF THE QUALIFIED IMMUNITY DEFFENSE.

Both the District Court and the Court of Appeals assumed that the Petitioners' truck was illegally seized, because the seizure was accomplished without a warrant, without consent and/or the seizure occurred in the

absence of an exigent circumstance. (The Respondents' initial investigation of the status of the Petitioners' truck began January 17, 1995, but the seizure of the Petitioners' vehicle occurred almost two months later on March 16, 1995). The District Court refused to consider any evidence gleaned from the seizure, however, the Court of Appeal was not concerned with the possible effects of the "exclusionary rule" in a civil case.

In the criminal context the stated purpose of the exclusionary rule is to deter the police for their misconduct in violating the constitution, i.e. the 4th Amendment. *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961); *United States v. Calandra*, 414 U.S. 338 (1974). The rationale for the exclusionary rule would seem to be even more relevant and more justifiable in the context of a suit against the very same police officials for their violation of the 4th Amendment. A court making the determination of a Motion to Suppress may not allow a police officer to rely on the fruits of his/her illegal search to justify his/her conduct. Since the offending officers are the very same individuals who conducted the presumably illegal search, the rationale for the exclusionary rule makes more logical sense in this context than it might make in a criminal context. A police officer who is prohibited from using the fruits of his illegal conduct and actually has to feel the sting of his own misconduct by trial and the payment of a civil judgment will be more deterred that an officer who has no actual personal stake as an officer in a criminal case. This court should assume jurisdiction of this cause and determine this very important issue.

The Court of Appeals erred and incorrectly suggested that a Texas Statute (Texas Transportation Code § 501.158 see Appendix) gave the officers a reason to avoid liability for the seizure. The problem with the Court's reasoning is that the statute is not applicable to the facts of this cause. This is because both Towe and Norris knew before their seizure that the Petitioners' truck had been lawfully assigned a "new serial number", and neither of them had any reason to believe that the official State of Texas assigned "serial number" located on the door jamb of the Petitioners' truck was either missing or that it had been removed or obliterated. A VIN and a serial number do not always have the same meaning. When a new serial number is assigned by the Texas Dept. of Transportation this number is placed on door jamb and renders the manufacturers' VIN a nullity for use as a serial number. (See Tex. Tran. Code § 501.003(18) See Appendix).

II. QUALIFIED IMMUNITY SHOULD NOT BE AVAILABLE TO A POLICE OFFICER, DEFENDANT, WHO MADE A SEIZURE OF A MOTOR VEHICLE IN THE ABSENCE OF PROBABLE CAUSE OR WARRANT OR EXIGENT CIRCUMSTANCE.

III. A COURT OF APPEALS SHOULD NOT ASSUME JURISDICTION OF INTERLOCUTORY APPEAL OF A DENIAL SUMMARY JUDGMENT PROCEEDING CONCERNING QUALIFIED IMMUNITY WHEN THERE ARE CONTESTED FACTS MATERIAL TO THE RENDITION OF A DECISION.

IV. A COURT SHOULD NOT IGNORE AND VIOLATE F.R.C.P. 56 AND USE CONTESTED FACTS IN A SUMMARY JUDGMENT PROCEEDING TO SUPPORT A POLICE OFFICER'S CLAIM TO QUALIFIED IMMUNITY.

The Court of Appeals indicated that the Petitioners' vehicle was improperly seized, but the Court indicated that a number of factual criteria gave the Respondents protection from suit.

The Court of Appeals has ignored or perverted decisions from the United States Supreme Court pertaining to the determination of claims of qualified immunity. The Petitioners believe that the District Courts' careful review of the summary judgment record, correctly determined that the facts proffered by the Respondents justifying their summary judgment claims of qualified immunity were contested. (This District Court also said it was prohibited from considering evidence obtained from an illegal search and seizure). The Court of Appeals then, without basis, said the same facts were not contested and that the officers were entitled to rely on what they claim they found after their presumptively illegal search and seizure. (This was done even when the Court of Appeals conceded the seizure of the Petitioners' truck was accomplished in violation of the Fourth Amendment.) Nothing in *Johnson v. Jones*, 515 U.S. 304 (1995) nor in *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) or *Mitchell v. Forsyth*, 472 U.S. 511 (1985) authorized the Court of Appeals to assume jurisdiction of this cause. Further, nothing in summary judgment jurisprudence authorizes a court to declare "contested facts" in a summary judgment proceeding in favor of one of the

parties. The Court of Appeals clearly erred in failing to recognize its obligation to view summary judgment evidence in a light most favorable to the motion's opponent (the Petitioners). The Court of Appeals violated its own precedent. *Gremillion v. Gulf Coast Catering*, 904 F. 2d 290 (5th Cir. 1990). The Court of Appeals violated Federal Rule of Civil Procedure 56 and the holdings in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). This Court should use its supervisory powers and correct this abuse of power and the Court of Appeals efforts' and overreaching to find a basis for qualified immunity when there were no uncontested facts to support such a finding. No opinion from the Supreme Court has authorized any court to ignore Rule 56 criteria in a qualified immunity context nor has any Court been authorized to make factual determinations based on a contested record. The Petitioners offered summary judgment evidence that demonstrated that the Respondents had no probable cause for the seizure of their truck and that the Respondents stated reasons were false and/or based on perjured evidence. There are no uncontested facts that would justify a finding that the Respondents made an "honest mistake" or that they "accidently" seized the Petitioners' truck. The evidence, viewed in a light most favorable to the Petitioners was that the Respondents are liars and distorters of the facts and do not know what "probable cause" is.

According to the Court of Appeals, there were numerous factors that justify finding that the Respondents were entitled to qualified immunity, in spite of the Court of Appeals concession that the Respondents' initial seizure was unlawful. However, the reasons relied upon

by the Court of Appeals are actually based on facts hotly contested by the Petitioners and therefore should not be lawfully used by a court to render a summary judgment. According to the Court of Appeals, the Respondents' belief in the following matters justified their entitlement to immunity.

A. Towe and Norris Knew Various VINs Were Missing.

According to the Petitioners summary judgment evidence missing VINs on a reconditioned vehicle would mean nothing because it is not unusual for a reconditioned vehicle to have missing manufacturer's VINs. This factor coupled with the Respondents' knowledge of the title history from the State of Texas, Department of Transportation that established that the state had assigned a new serial number to the Petitioners' truck and that one of the prior owners (William Searcy) told the Respondents that he had most probably removed the manufacturer's VIN from the dash of the truck before he sold the body actually demonstrate that "missing VINs" in the context of this case mean nothing and that nothing was suspicious or illegal that would support any seizure of the Petitioners' truck.

B. That The Plaintiffs' Truck Was Registered To A Dealer.

There is nothing suspicious or indicative of criminal activity for a car dealership to choose not to purchase and use Texas dealer license plates for a vehicle it owns. The

evidence was that one of the Petitioners' spouses, Jennifer Wren, used the truck for personal use and the Petitioners had spent extra money to turn the Petitioners' truck into a "show piece".

C. That The Truck's Present Condition Did Not Match Its Damage Record.

These facts were hotly contested by the Petitioners. The Petitioners presented evidence that a cursory visual examination of the Petitioners' truck would have readily revealed that changes in the truck's appearance clearly matched its prior "damage record".

D. That The Truck Was Sold With A Lien On It.

The summary judgment record does not unequivocally establish this fact either. A cursory reading of one of the prior owner's summary judgment Affidavit (William Searcy) does not indicate a reason to believe a lien existed. Texas Transportation Code Section 501.091 indicates that the sale of parts from a vehicle is not affected by a lien recorded or the Certificate of Title. (Towe and Norris had also falsely claimed former owner of the truck body (Searcy) had told Norris that GMAC repossessed his truck. Searcy denied this in his affidavit).

E. That The Truck Was Reported Stolen.

There is nothing in the summary judgment record that would justify a belief in the existence of such a "report" because at the time of the seizure there was no outstanding report that part or all of the Petitioners'

vehicle was reported stolen. At no time in 1995 was there any outstanding report that any part of the Plaintiffs' truck had been reported stolen. Lt. Pothen, the officer who had inspected the Plaintiffs' truck immediately before it was retitled and assigned a new serial number testified that he used the police computer records to establish that no stolen part had been used in the reconditioning of the Petitioners' truck. The Court of Appeals at the instigation of Norris and Towe ignored the facts that hurt the Respondents' claims to immunity; e.g., Towe and Norris claimed that there was a "Report" that a truck formerly owned by McGee was stolen and was then burned by the thieves who had appropriated the vehicle. Omitted from the opinion was that this truck was recovered by the police and that the insurance company who had paid the McGee's insurance claim acquired the truck and then sold it. The McGee truck was ultimately acquired by the reconditioner of the Petitioners' truck and the undamaged motor, chassis and transmission was used to build the Petitioners' truck. These acts all occurred over a year before the Respondents' seizure of the Petitioners' truck and these acts were reflected in the trucks title history that was in the possession of the Respondents before the seizure of the Petitioners' truck. The Court of Appeals in its rush to judgment to find qualified immunity protection failed to realize that the "Report" that stolen parts were used in the construction of the Petitioners' truck was meaningless, stale information that was not indicative of anything establishing a basis to seize.

F. That The Form 68-A Was Suspicious.

The only basis stated by the Court of Appeals supporting the proposition that the 68-A was suspicious is that "Norris smelled collusion". The source of Norris' "smell" is not actually explained by the Court of Appeals but apparently comes from the circumstance that DeSoto Police Lt. Paul Pothen completed the Form 68-A for his then "confidential informant" Randy Brown. (Brown constructed what ultimately became the Plaintiffs' truck. The Form 68-A is one of the forms required by the State of Texas to obtain a "reconditioned title"). The Court of Appeals has apparently accepted, without supporting evidence, the proposition that a police officer such as DeSoto, Texas, police Lt. Paul Pothen, who handles informants is inherently dishonest and/or is prone to shade the law and/or facts for his informant. (Quite correctly, the District Court was not willing to jump to this conclusion). Lt. Paul Pothen, as his summary judgment affidavit demonstrates, very carefully scrutinized his informant's (Randy Brown) actions.

G. That The Plaintiffs' Truck Was Linked To An Illegal "Chop Shop"

A police suspicion that somebody's business operations are illegal means nothing unless there are facts and/or circumstances to back up these suspicions. The Respondents did not offer one objective fact that supports the claim that the reconditioner of the Petitioners' truck were dealing in stolen truck parts or operating an illegal "chop shop". The Petitioners presented evidence from DeSoto, Texas, Police Lt. Paul Pothen and Randall Brown

that there was no factual basis for ever believing that an illegal "chop shop" was in operation.

V. A POLICE OFFICER WHO MAKES A WARRANTLESS SEIZURE OF PROPERTY IS REQUIRED TO JUSTIFY HIS SEIZURE TO A MAGISTRATE BY SUBMITTING AN OATH OR AFFIRMATION STATING PROBABLE CAUSE FOR THE SEIZURE.

VI. A POLICE OFFICER WHO MAKES A SEIZURE OF PROPERTY AND THEN SUBMITS A CONCLUSIONARY AFFIDAVIT TO A MAGISTRATE AND THEN COMPOUNDS THE SITUATION BY THE USE OF FALSE TESTIMONY SHOULD BE HELD LIABLE TO THE OWNER OF THE PROPERTY FOR WRONGFUL SEIZURE.

The United States Constitution contemplates that a police officer must justify warrantless arrests to an impartial magistrate within forty-eight (48) hours. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Because the constitutional requirements for all searches and seizures (arrests) are the same, (*see Payton v. New York*, 445 U.S. 573 (1980), this would mean that one of Respondents should have submitted an affidavit detailing the "probable cause" justifying their seizure of the Petitioners' truck.

The Court of Appeals' ignored that the Petitioners had contended and the Petitioners' evidence demonstrated that Towe/Norris did not support their seizure by the submission of a probable cause affidavit to a magistrate. The Petitioners' summary judgment evidence was that the Respondents lied to the Justice of the Peace at a hearing on April 14, 1995 concerning their "probable

cause" for their seizure of the truck and their factual basis for seeking the award of the Petitioners' truck to the State of Texas.

Towe's "justification" presented to the Justice of the Peace fails to meet constitutional criteria, miserably. His presentation to the Justice of the Peace reads thusly.

> Comes now, Jim Towe, a peace officer with Department of Public Safety - MVTS, and shows this court that in this country on this day each of the following numbered items of property consisting of a motor vehicle or part of a motor vehicle was taken into possession by this officer under the authority of the Certificate of Title Act, Article 6687-1, sec 49(c) Vernons Civil Statutes: White/Blue GM Extended-Cab Pickup.
>
> Wherefore, the State prays that the property be ordered held by FBI - Task Force, pending a property hearing in this court under Chapter 47, Code of Criminal Procedure. A list of each person known to this officer as being reasonable [sic] likely part to have an interest in this hearing is listed on the back.
>
> Signed this the 16th day of March, 1995.
>
> /s/ Jim Towe
> Peace Officer (signature) (R. 98.)

The above is nothing more than Towe's factually unsupported legal conclusion that does not meet established fourth amendment requirements. *Whiteley v. Warden*, 427 U.S. 463 (1971); *Giordenello v. United States*, 357 U.S. 480 (1958); *Aguilar v. Texas*, 378 U.S. 108 (1964). Because the Petitioners' summary judgment evidence was that Towe's

and Norris' claims justifying their seizure of the Petitioners' truck were either false and/or distorted versions of the true facts contained in the "title history", they should not have escaped liability to them. Lying to a court to justify a seizure is unlawful and is actionable as well. *Franks v. Delaware*, 438 U.S. 154, (1978), *Malley v. Briggs*, 475 U.S. 335 (1986). Even if the initial seizure was somehow subject to claims of immunity, it should be actionable for failing to file a valid justification for seizure. The Respondents should not then escape liability or trial by subsequently lying about their justification for seizure as well. This court should assume jurisdiction over this cause and correct the Court of Appeals' failure to recognize its Constitutional obligations under the 4th Amendment and its obligations to litigants who bring § 1983 claims for damages. The fact that the State of Texas acting through its Attorney General's Office in effect conceded that there was no basis to hold the truck for the state should strongly indicate that justice has not been rendered in this cause.

CONCLUSION

For the foregoing reasons, A.J. and Jerry Wren request that their petition for a writ of certiorari be granted and that a writ of certiorari be directed to the United States Court of Appeals for the 5th Circuit and that after hearing and consideration, that this Court then

reverse the decision of the Court of Appeals and remand this cause to the District Court for trial.

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APPENDIX
A

A.J. WREN and Jerry Wren,
Plaintiffs-Appellees,

v.

Jim TOWE, et al., Defendants-Appellants.

No. 96-11388.

United States Court of Appeals,
Fifth Circuit.

Dec. 30, 1997.

Appeal from the United States District Court for the Northern District of Texas.

Before REYNALDO G. GARZA, SMITH and WIENER, Circuit Judges.

PER CURIAM:

The case before this panel comes from the United States District Court for the Northern District of Texas, Judge Robert B. Maloney, presiding. The district court denied a motion for summary judgment made by the Defendants-Appellants, Jay Norris ("Norris") and Jim Towe ("Towe") on the issue of qualified immunity.

Background

In January of 1995, Norris was teaching a class in Basic Auto Theft to a group of students at the Arlington Regional Police Academy. During one of these lessons, Norris was informed by an eager student that he saw a Chevrolet pickup truck parked in the parking lot that was missing its dashboard Vehicle Identification Number ("VIN"). Norris, a member of the Dallas FBI Auto Theft Task Force and a Special Texas Ranger, began investigating the ownership of the truck.

Norris confirmed the absence of the dashboard VIN, and he conducted a computer database search on the truck. This search showed that the truck was registered to a dealer, though it did not have dealer tags, was not on a sales lot, and did not have a "for sale" sign. Norris ran a search on the license plates of the truck, which indicated a different VIN for the truck. Further investigation suggested to Norris that the truck had been totaled or salvaged at some point, but the truck did not appear to be a salvaged or rebuilt vehicle to Norris at that time.

Norris contacted the former owners of the truck, who explained that it had been stolen and burned, a claim confirmed by the insurance company. At a later time, the truck was owned by Texas Custom Trucks, a truck reconditioning[1] business which was under investigation by the Dallas FBI Auto Theft Task Force as a suspected "chop shop," a business which fashions reconditioned vehicles from stolen parts. The State of Texas has a procedure designed to foil would-be chop shop operators, in which reconditioned vehicles must be inspected by a law enforcement official and certified to be a legitimately reconditioned vehicle on Texas Department of Transportation ("DOT") Form 68-A (the "Form"). The Form 68-A on this truck was signed by Lt. Paul Pothen ("Pothen"), a narcotics officer with the DeSoto, Texas, police. Randy Brown ("Brown"), the proprietor of Texas Custom Trucks,

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[1] A reconditioned truck is an amalgam of body parts cannibalized from other trucks. This truck was formed from the cab of one truck attached to the frame and chassis of another. Body components on Chevrolet trucks made between 1988 and 1997 are interchangeable.

was a narcotics informant of Pothen's. Norris smelled collusion.

Pursuing his investigation further, Norris located a DOT Form 61, which revealed that the truck cab was owned by a William Searcy ("Searcy"). Searcy was contacted by Norris, and they spoke. The substance of the conversation with Searcy is a matter of dispute,[2] but it is undisputed that Searcy told Norris where he could find certain unique features on the cab (custom lights, etc.), and that GMAC held a lien on the truck.

Norris contacted GMAC, and was told that GMAC never repossessed Searcy's truck. He was also told that a lien was outstanding on the truck. The totality of all these circumstances led Norris to believe a crime may have been committed when Searcy sold the vehicle or its components without paying the GMAC lien.[3] Norris then contacted Towe, an officer of the Texas Department of Public Safety ("DPS"), who was attached to the Dallas FBI

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[2] For the purposes of this appeal, we cannot assume that, as Norris claims, Searcy said he sold the doors to another man, that the truck was more severely damaged then he presently claims, or that the lienholder on the truck, the General Motors Acceptance Corporation ("GMAC") repossessed the remainder of the truck. However, if we did assume that the conversation went the way Norris said it did, the conversation would add to Norris's suspicions.

[3] Norris apparently had in mind TEX.PEN.CODE § 31.03(c)(6)(B), which provides that a buyer of a wrecked vehicle is presumed to know that the vehicle is stolen unless the seller provides a title certificate showing that the vehicle is not subject to a lien. We need not and do not decide whether GMAC was the rightful owner at this time.

Auto Theft Task Force. Norris asked Towe for assistance in this investigation, and Towe agreed to help.

On March 16, 1995, Norris and Towe located the truck and the purported owners, Jennifer and Jerry Wren, the Plaintiff-Appellees (the "Wrens"). The truck was parked in a public place, and Norris and Towe conducted a search.[4] No VIN was found in the glove compartment, and there were parts throughout the vehicle with dates earlier than the truck's manufacture. This, coupled with the suspicious Form 68-A and the other circumstances, led Norris and Towe to believe that the vehicle was the product of an illegal chop shop. Norris and Towe decided that seizure of the vehicle was necessary for a more extensive investigation and that the seizure was justified under the TEX.CODE OF CRIM.PROC. ART 47.01, *et seq.*, and ART. 6687-1 § 49(c) (now codified as § 501.158 of the TEX.TRANS.CODE). The vehicle was seized, the Wrens were issued a receipt, and the requisite inventory form was filed with the Justice of the Peace Court. Upon further investigation of the vehicle, it was discovered that more confidential VINs were missing or obliterated. Norris and Towe thought this was inconsistent with a legitimately reconditioned truck.

A hearing was held on April 14, 1995, before Justice of the Peace Roy Kurbin, pursuant to his authority and jurisdiction under TEX.CODE OF CRIM.PROC. ART. 47.01, *et seq.* After hearing the evidence, Judge Kurbin found that

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[4] Norris and Towe assert that the Wrens consented to the search, but the Wrens now deny such consent. This matter will be dealt with in the analysis section.

probable cause existed at that time, and awarded possession to the Dallas FBI Auto Theft Task Force. Subsequently, it became apparent that the truck was not the product of an illegal chop shop. The truck was held until August 23, 1995, when the county court awarded the vehicle to the Wrens, pursuant to an agreed order.

The Wrens filed suit against Norris and Towe[5] on July 6, 1995, asserting claims under 42 U.S.C. § 1983 for violations of the Fourth and Fourteenth Amendment protections against unreasonable seizure, together with state law claims of trespass and conversion. Norris and Towe claimed both qualified and official immunity. Norris and Towe moved for summary judgment, and their motion was denied on October 2, 1996 by Judge Robert B. Maloney. Judge Maloney held that (1) the hearing before Judge Kurbin did not insulate the officers from liability, (2) there is a dispute over whether the Wrens consented to the search, and (3) viewed in the light most favorable to the Wrens, the evidence tended to show that Norris and Towe did not have probable cause to seize the truck.

Norris and Towe timely appealed, and the case now lies before this panel.

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[5] A third defendant, Olen Manning, was dropped from this suit by the district court. The district court held that Manning had no part in the search and seizure, and hence could not be sued in this case. Summary judgment was granted in his favor, and this matter is not appealed.

Jurisdiction and Standard of Review

Generally, this Court will only hear appeals from final orders, and thus, we usually would not hear an appeal from a denial of summary judgment. *Naylor v. State of La. Dept. of Corrections*, 123 F.3d 855, 857 (1997). However, where summary judgment is denied in a civil rights action on the question of a government officer's immunity from suit, exceptions to this general rule exists. The collateral order doctrine is such an exception, and permits an interlocutory appeal in circumstances such as these. *Id.; see also Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Hale v. Townley*, 45 F.3d 914, 918 (1995).

Our review of the matter is limited by the extent to which the district court's actions were based upon an issue of law. *Johnson v. Jones*, 515 U.S. 304, 312-314, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238 (1995) (no immediate appeal of orders based on sufficiency of evidence). However, the existence of disputed issues of material fact does not necessarily preclude review of the case. "*Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for the purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.' " *Behrens v. Pelletier*, 516 U.S. 299, ___, 116 S.Ct. 834, 842, 133 L.Ed.2d 773 (1996); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Coleman v. Houston Indep. School Dist.*, 113 F.3d 528 (5th Cir.1997).

Many of the facts relating to the availability of qualified immunity are in dispute, but this alone does not prevent summary judgment. A district court's denial of

summary judgment is not immune from interlocutory appeal simply because the denial rested on the fact that a dispute over material issues of fact exists. *Behrens*, 516 U.S. at ___, 116 S.Ct. at 842. To foreclose appeal, the disputed facts must be central to and not severable from the matter of qualified immunity. *Id.* In this case, we feel that we have jurisdiction based on the undisputed facts, even if we assume the resolution of disputed facts in the Wrens' favor. Our basis for this conclusion will be stated later.

The standard of review is as follows. We review a district court's denial of summary judgment *de novo*. *Coleman*, 113 F.3d at 533. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to summary judgment as a matter of law." FED.R.CIV.P. 56(c). The party seeking summary judgment bears the burden of showing that there is an absence of evidence to support the non-movant's case, and after a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. *Coleman*, 113 F.3d at 533.

Analysis

First of all, Norris is a law enforcement officer, and is entitled to qualified immunity. While it is true that Norris is retired from the Louisiana State Police, he is also presently a member of the Dallas FBI Auto Theft Task Force, an instructor at the Arlington Regional Police Academy

and the Texoma Regional Police Academy, a Special Texas Ranger, and a Deputy U.S. Marshal. We do not see any reason to doubt Norris' statements that he acted as a member of the Dallas FBI Auto Theft Task Force. Therefore, as a law enforcement officer, Norris can be entitled to immunity.

There exists a dispute between the parties regarding whether or not the Wrens consented to the search. In the absence of consent, a search warrant, or exigent circumstances, a search of the Wrens' truck would be illegal. We will assume this matter in favor of the Wrens and assume that the search was illegal. The analysis does not stop there, however. Exclusion of the evidence found by Norris and Towe on the basis that they had no legal right to search the vehicle would, in effect, be an application of the exclusionary rule to this case. Such an application would be inappropriate. The Supreme Court has never applied the exclusionary rule to civil cases, state or federal. *City of Waco v. Bridges*, 710 F.2d 220, 225 (5th Cir.1983).

It is true that the exclusionary rule applies in forfeiture proceedings. *Vance v. United States*, 676 F.2d 183, 186 (1982). This is because forfeiture is considered to be a criminal or quasi-criminal sanction. *Waco*, 710 F.2d at 225. This circuit has stated that because "forfeiture is clearly a penalty for transgressing criminal laws, exclusion of illegally seized evidence is thought to obtain the same

deterrent effect as exclusion in a criminal proceeding." *Jonas v. City of Atlanta*, 647 F.2d 580, 587 (5th Cir. Unit B 1981).[6]

The rationale behind the exclusionary rule is "to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," and application of the rule is "restricted to those areas where its remedial objectives are thought to be most efficaciously served." *United States v. Janis*, 428 U.S. 433, 446-447, 96 S.Ct. 3021, 3028-3029, 49 L.Ed.2d 1046 (1976) (citing *U.S. v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974)). Based on the deterrent rationale and the precedent, there is no reason to ignore and exclude the evidence found in the truck.

Also, regarding the seizure, TEXAS TRANSPORTATION CODE § 501.158 permits seizure of a vehicle with a missing VIN sticker without a warrant. This section of the code has never been declared unconstitutional, and we do not pass on its constitutionality at this time. We mention this point only to further show that the law does not require exclusion of the evidence because of a lack of a warrant.

Given the facts known both before and after the search, it cannot be said that Norris and Towe's belief that something illegal was happening was unreasonable. It is the information known at the time of seizure and the

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[6] It should be noted that the panel in *Jonas* expressed "grave reservations about whether, as a matter of law, police officers who illegally obtain evidence may use that evidence to establish a good-faith defense to a Section 1983 action." *Jonas*, 647 F.2d at 588 n. 12. These "reservations" are not in themselves binding precedent, and do not cover the situation in this case.

reasonability of the inferences drawn from such information which is the key. *See Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039-3040, 97 L.Ed.2d 523 (1987); *Hunter v. Bryant*, 502 U.S. 224, 227-228, 112 S.Ct. 534, 536-537, 116 L.Ed.2d 589 (1991).

Further, the district court assumed that the execution of a Form 68-A on a reconditioned vehicle establishes a presumption that the vehicle is legitimate. The district court felt that Norris and Towe's knowledge of the existence of the Form did not argue well for the reasonability of their inferences. This was in error. While the Form is definitely useful evidence in establishing legitimacy, we know of no precedent that turns the existence of a Form 68-A into a presumption of legitimacy. The Form merely requires that a law enforcement officer certify that he inspected the vehicle and that he found the manufacturer's number to be the VIN. The existence of the Form does not undermine Norris and Towe's case.

At this point, now that we have decided that all of the information known to Norris and Towe at the time of the seizure may be considered in determining the reasonability of their actions, we turn to the standards for qualified immunity, and how those standards apply to this case. Qualified immunity shields government officials performing discretionary functions from personal civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person should have known." *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738. Qualified immunity is immunity from suit altogether, not just a defense to liability. *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815-2816. The purpose

of qualified immunity is to shield law enforcement officers from the burdens of fighting lawsuits which arise from the good-faith performance of their duties. *Hunter*, 502 U.S. at 227-228, 112 S.Ct. at 536-537. Therefore, the issue of qualified immunity must be settled at the earliest possible point in litigation. *Id.*

As stated, a court must inquire into the "objective legal reasonableness" of an officer's actions in cases such as this. *Behrens*, 516 U.S. at ___, 116 S.Ct. at 838. There is a two-step analysis for determining the existence of qualified immunity. First, has a clearly established constitutional right been violated? *Mangieri v. Clifton*, 29 F.3d 1012, 1016 (5th Cir.1994). If the answer is yes, we analyze the situation and assess the objective reasonableness of the officer's actions. *Id.*

Qualified immunity protects government officials "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir.1990) (citing *Anderson*, 483 U.S. at 638, 107 S.Ct. at 3038). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1100, 89 L.Ed.2d 271 (1986). If reasonable public officials could differ on the legality of a defendant's actions, the defendant is entitled to immunity from suit. *Pfannstiel*, 918 F.2d at 1183.

The key point here is not whether Norris and Towe had probable cause to seize the truck, and the reliance of the district court on this point is in error. It is true that

after the initial seizure, the legitimacy of the reconditioned truck was established. This alone does not open Norris and Towe to liability. Law enforcement officers are only human, and inevitably, accidents and mistakes of judgment will happen, and these mistakes alone do not open officers to personal liability.

This circuit has dealt with such matters in two cases similar to this one: *Bigford v. Taylor,* 834 F.2d 1213 (5th Cir.1988) (*"Bigford II"*), and *Bigford v. Taylor,* 896 F.2d 972 (5th Cir.1990) (*"Bigford III"*).[7] In *Bigford II,* a truck was seized by law enforcement officers and the owner filed a civil rights claim. The suspicions of the Sheriff's Deputy in *Bigford II* turned out to be unjustified, but at the time the Deputy cited the following to support his suspicions: the Federal Inspection Safety Sticker was missing from the inside of the door, the Deputy thought the rivets affixing the VIN plate to the dash were tampered with, the Deputy thought the truck's body did not match its frame, and he could not find the VIN stamped on the engine (it was there, and later found). *Bigford II,* 834 F.2d at 1215-1216.

Further, in *Bigford II,* the Deputy, using a computer database, found that the truck was never listed as stolen. Also, the plaintiff established a clear chain of title from the original owner to himself. Still, the truck was seized, held in an impound lot for three years, and reduced to a pile of scrap by Hurricane Alicia. *Id.* at 1216-1217. This

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[7] *Bigford I,* 784 F.2d 1111 (5th Cir.1986) was an earlier unpublished case sending the matter to trial. *Bigford II* was remanded and tried on the merits, and the case went back up to this circuit as *Bigford III.*

Court found that Bigford's rights were violated, that no probable cause existed, and remanded the case for further proceedings. *Id.* at 1223.

After a trial, the case returned as *Bigford III.* This Court undertook the second part of the analysis, and examined qualified immunity. This Court noted that the probable cause standards for reasonableness differ from those for qualified immunity. After analyzing the facts, this Court concluded that the "fact situation is too close to say that these conflicting indications could not have led a reasonable officer to believe that there was probable cause to seize the truck," and the officer was held to be entitled to immunity from liability. *Bigford III,* 896 F.2d at 975.

Norris and Towe had far more reasons to be suspicious than the Deputy in the *Bigford* cases. If *Bigford* was an example of a close case which allowed for immunity, this case surely allows for immunity. Norris and Towe knew that various VINs were missing, that the truck was registered to a dealer, that the truck's present condition did not match its damage record, that the truck was reported stolen, that the truck was sold with a lien on it, that the Form 68-A was suspicious, and that the truck was linked to an alleged illegal chop shop. While these facts have been explained, at the time, it can hardly be said that a suspicion based on these facts was unreasonable.

The Wrens also allege state law claims for trespass and conversion, and Norris and Towe invoke official immunity under state law for these claims. We have jurisdiction over these claims as we do the federal claims.

See Mitchell, 472 U.S. at 524-530, 105 S.Ct. at 2814-2818. Texas law of official immunity is substantially the same as federal qualified immunity law. *Cantu v. Rocha*, 77 F.3d 795, 808 (5th Cir.1996).

Texas law provides for immunity from suit for government officials for matters arising from the performance of their discretionary duties, as long as they are acting in good faith and within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994). As stated, Norris and Towe's actions were in good faith, and their actions were obviously within their scope of authority. Also, the Wrens have not shown that Norris and Towe's actions were unreasonable, as is necessary. *Cameron County v. Alvarado*, 900 S.W.2d 874, 880 (Tex.App. – Corpus Christi 1995, writ dism'd w.o.j.). Hence, Norris and Towe are immune from suit in the state claims as well.

Conclusion

The district court erred in denying summary judgment in favor of the Defendants-Appellants, for the reasons listed. Therefore, we REVERSE and REMAND the decision of the district court, and we order the district court to render judgment in favor of Norris and Towe, granting them qualified immunity.

REVERSED AND REMANDED.

APPENDIX

B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11388

A J WREN; JERRY WREN

Plaintiffs – Appellees

v.

JIM TOWE; JAY NORRIS

Defendants – Appellants

Appeal from the United States District Court for the Northern District of Texas, Dallas

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(Filed Feb. 19, 1998)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 12/30/97, 5 Cir., ___, ___ F.3d ___)

Before REYNALDO G. GARZA, SMITH, and WEINER, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members

of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge

Judge King did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX

C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

A.J. WREN and JERRY WREN,

Plaintiffs,

v.

No. 3:95-CV-1398-T

JIM TOWE,
et al.,

Defendants.

ORDER RULING ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

(Filed Oct. 2, 1996)

Before the Court are the Motions for Summary Judgment filed by Defendants Jim Towe, Jay Norris, and Olen Manning. The motions are opposed. After considering the motions, the response, the replies, and the objections to the summary judgment evidence, the Court is of the opinion that the motions of Towe and Norris should be denied, and the motion of Manning should be granted.

This is a civil rights case arising under 28 U.S.C. § 1983. Plaintiffs A.J. and Jerry Wren contend that Defendants violated their rights protected by the Fourth and Fourteenth Amendments to the United States Constitution by seizing a 1991 Chevrolet pickup truck without probable cause. Plaintiffs contend that the seizure occurred while Defendants were acting under color of

state law. Plaintiffs also allege state law claims for trespass and conversion.

The affidavit of Defendant Norris indicates that, at the time of the events that form the basis of this lawsuit, he was commissioned as a Special Texas Ranger and was sworn in as a Deputy United States Marshall. Norris also indicates that he was a member of the Dallas Federal Bureau of Investigation Auto Theft Task Force and working as a private investigator for a group of insurance companies. The Court assumes for purposes of this motion that Norris was acting under color of state law and that he may be entitled to immunity if his actions were objectively reasonable.[1]

Norris states in his affidavit that on January 17, 1996, he was instructing cadets in a basic auto theft investigation course at Arlington Regional Police Academy. During the class, one of his students brought to his attention a vehicle in the parking lot that did not have a visible dashboard Vehicle Identification Number (VIN). Norris noted the license plate number and later ran a license check with the Department of Transportation database. The database indicated that the vehicle was reconditioned and was registered to S & W Auto Sales.

Still concerned about the missing VIN, Norris ran another computer check using a VIN obtained in the first

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[1] The Court remains uncertain, however, in what capacity Norris was conducting this investigation.

computer search.[2] The new search revealed that the current owner of the vehicle was Northern Country Mutual Insurance Company and that the previous owner was Richard McGee. The search also revealed that the vehicle had probably been totaled and salvaged, and that it was owned at one time by Prestige Auto Sales. Still concerned about the vehicle, Norris called Prestige. An employee at Prestige stated that the vehicle had been sold to Texas Custom Trucks in Lancaster, Texas.

After this initial computer investigation, Norris contacted Richard McGee, who stated that truck had been stolen and burned. McGee's insurance carrier confirmed this and added that the truck had been totaled.

Norris then contacted Sergeant Walter Degner of the Dallas Police Department. Degner informed him that Texas Custom Trucks was under review by members of the Dallas FBI Auto Theft Task Force. Norris states that Texas Custom Trucks "apparently had a reputation for purchasing vehicles at salvage pools, re-building them with what had been verified as stolen parts, and selling them." Norris does not state upon what facts this apparent reputation is based.

Defendant Olen Manning then provided Norris with a file on Texas Custom Trucks. The file contained some of the title history of the truck, including DOT forms 61 and 68-A. Form 68-A is a form mandated by Texas law requiring a peace officer to certify that a salvaged or rebuilt vehicle is a legitimate, reconditioned vehicle.

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[2] It is not readily apparent from the record where this VIN was located on the vehicle or precisely how it was obtained.

Norris states that he learned from Manning and Defendant Jim Towe of the Texas Department of Public Safety that Texas Custom Trucks was owned by Randy Brown. Brown was also a narcotics informant for Lieutenant Paul Pothen of the DeSoto, Texas, Police Department. Norris was concerned because the 68-A form was signed by Pothen. He implies that because Brown was Pothen's informant, Pothen would falsify the form for Brown; however, other than this implication, Norris fails to state any facts that would lead the court to this conclusion.

Unconvinced by Pothen's certification, Norris continued his investigation. He determined through records on file that the cab of the truck was previously owned by William Searcy. Norris then contacted Searcy.

Although the content of the interview with Searcy is disputed, it appears to be undisputed that Searcy stated that his deceased father had left him a 1989 Chevrolet truck, which he later wrecked. Searcy described certain "identifiers" to use in identifying his cab. Norris states that Searcy described the locations of marker lights on the top front of the cab and opera lights he had installed at the side window of the cab, as well as other areas where the truck had been damaged.

On March 16, 1996, Norris and Towe located Plaintiff Jennifer Wren at her place of employment. It was believed that she was the owner of the truck. Norris states that Wren gave her consent to search the vehicle if her husband agreed and when he, Plaintiff A.J. Wren, arrived, he gave his consent to search. Towe then seized the truck in the name of the Dallas FBI Auto Theft Task Force.

Norris contends that he had probable cause to believe that the truck was the product of illegal activity because: (1) the search revealed no evidence of the indicators described by Searcy; (2) the VIN was removed from the dash; and (3) the Form 68-A was executed by a narcotics officer and his informant. Norris also contends that *Tex. Rev. Civ. Stat. Ann.* art. 6687-1 § 49(c) (now codified at § 501.158 of the Texas Transportation Code) authorized the warrantless seizure based solely on the missing VIN.

Norris claims that several days after seizing the truck, he examined it further to determine whether other confidential vehicle identification numbers matched the current paper work. He states some of the other confidential identification numbers were obliterated or tampered with.

On April 14, 1996, a hearing was conducted pursuant to Tex. Code Crim. P. art. 47.01 *et seq.*, in Tarrant County Justice Court. At the conclusion of the hearing, the judge awarded the truck to the Dallas FBI Auto Theft Task Force.

Norris states that at the hearing a private investigator produced photographs obtained form Searcy, which Norris contends Searcy previously denied having. Norris states that after seeing the photographs, he made another inspection of the truck and was able to locate filled holes where opera lights and a luggage rack might have been installed. Based on the holes and the photographs, Norris determined that probably the cab was Searcy's and was not stolen.

Plaintiffs' evidence casts a different light on the events. First, Plaintiffs contend that they did not consent to the search of the vehicle. Second, Plaintiffs contend that the confidential VINs have not been tampered with, that they are located in places consistent with other General Motors vehicles, and that the door VIN matches the VIN of Searcy's truck. Plaintiffs also contend that the identifiers described by Searcy were easily locatable, and that Defendants simply ignored them. Third, Searcy disputes Norris's characterization of their interview. Fourth, Plaintiffs contend that Defendants lied to the judge during the seizure hearing.

Plaintiffs also provide the affidavit of Pothen.

Pothen states that he is a fifteen year veteran of the Desoto Police Department, assigned to the department's Special Investigation Unit as its commander. On January 18, 1995, Pothen was told that vehicles built and reconditioned by Brown were being seized by Special Agents of the Dallas FBI Major Offender Interstate Theft Task Force.

On February 3, 1995, Pothen requested a meeting with Manning regarding Brown. On February 6, 1995, Pothen met with Manning, FBI Special Agent Lori DelGrippo, and Special Agent Andrew D. Bishop of the Internal Revenue Service Criminal Investigation Division. Pothen informed Manning that Brown was currently cooperating with and assisting the Desoto Police Department, IRS-CID, and the United States Drug Enforcement Agency. Pothen also indicated to Manning that he had known Brown for a considerable period, that Brown had proven to be a trustworthy individual, and that he personally inspected some of the vehicles reconditioned by

Brown. According the [sic] Pothen, Manning responded that there would be "some embarrassed persons" when he concluded his investigation of Brown and Texas Custom Truck Sales.

On February 9, 1996, Manning contacted Pothen and asked how many vehicles Pothen had inspected for Brown. Pothen stated that he had inspected six or seven.

On March 28, 1995, Pothen met with FBI Special Agent Starks because of the adverse impact of Manning's investigation of Brown. Manning represents that Starks had five years experience working undercover with the FBI Major Offender Interstate Theft Task Force, specializing in auto theft. Pothen also represents that although Starks was familiar with Brown, Brown's name never surfaced in connection with any illegal auto theft activity.

Regarding the inspection of Plaintiffs' truck, Pothen states that the inspection was conducted by comparing the engine, frame, and transmission numbers against the accompanying documentation. Pothen also checked the relevant identification numbers through law enforcement computers. At the time of the inspection, the glove compartment displayed a VIN sticker with a number corresponding to a Nader [3] sticker affixed to the driver's door. A computer verification showed that the VIN sticker on the glove compartment and the Nader sticker belonged to William Searcy. Pothen states in his affidavit that no lesser standard was employed in the inspection of this or

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[3] The Court is uncertain precisely what a "Nader" sticker indicates, but assumes that it is similar to a VIN.

any other vehicle because of Brown's cooperation with the DeSoto Police Department.

Pothen also states that the method employed was consistent with accepted law enforcement vehicle inspection standards as reflected by the guidelines promulgated by the National Auto Theft Bureau, which is the predecessor agency of the National Insurance Crime Bureau.

Defendants deny liability claiming entitlement to the defense of qualified immunity. Defendants contend that they had probable cause to believe that the truck was the product of illegal activity, and that they properly seized the vehicle. Defendants now move for summary judgment on all claims.

Summary judgment should be entered only where the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The movant bears the burden of establishing the propriety of summary judgment. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The substantive law will identify what facts are material. *Id.* at 248. A dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248.

In analyzing an assertion of qualified immunity, the court must first determine whether the plaintiff has

alleged a violation of a clearly established federal right. *Seigert v. Gilley*, 500 U.S. 226, 231 (1991). Second, the court must determine whether the actions of the defendant was objectively reasonable in light of the clearly established law outlining the specific contours of the federal right. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

In this case, Plaintiffs allege that their property was seized without probable cause. The right to be free from unreasonable seizure is a right clearly established by the Constitution. Therefore, the critical inquiry in this case is whether the officers' actions in seizing the truck were objectively reasonable. Objective reasonableness is assessed in light of legal rules clearly established at the time of the incident. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990).

Claims Against Manning

The undisputed evidence indicates that Manning did not participate of [sic] the search or seizure of Plaintiffs' truck. The Court determines that there is no basis to hold Manning liable to Plaintiffs in this case.

Claims Against Towe and Norris

Defendants contend that *Tex. Rev. Civ. Stat. Ann.* art. 6687-1 § 49(c) (now codified at § 501.158 of the Texas Transportation Code.) authorized the warrantless seizure based solely on the missing VIN. Nevertheless, it is well settled in the Fifth Circuit that where "officers acting reasonably and prudently on the basis of all the available information, and familiar with practical considerations of

everyday life, would not have concluded that the truck was stolen," seizure based solely on a missing VIN is objectively unreasonable. *Bigford v. Taylor*, 834 F.2d 1213, 1219 (5th Cir. 1988).[4]

In this case, a reasonable inference from the evidence of record is that Defendants were aware that the truck was reconditioned and was certified by a peace officer as a legitimate reconditioned vehicle in accordance with Texas law. As Defendants have failed to articulate any facts which would indicate that they had reason to believe that Pothen was dishonest, the Court cannot conclude that it was objectively reasonable to search the vehicle, let alone seize it.

It is important to note that Defendants have not even intimated that they suspected Plaintiffs of any wrongdoing. It is clear from the record that Defendants suspected Brown of running an illegal "chop-shop." Thus, Defendants suspected that illegal parts were installed before the car was purchased by Plaintiffs. As stated above, however, the vehicle was certified as authentic by a peace officer – and Defendants have failed to articulate any facts which would indicate that Pothen acted improperly or was otherwise unqualified to perform his official duties.

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[4] The Court is mindful that a panel of the Fifth Circuit ultimately concluded that the officer in *Bigford* was entitled to qualified immunity. *Bigford v. Taylor*, 896 F.2d 982 (5th Cir. 1990). Nevertheless, qualified immunity was granted solely because the contours of the right were not clearly established at that time. *Id.* at 974.

One purpose of the requirement that a peace officer sign off on the 68-A form is to ensure that the owners of legitimate reconditioned vehicles are not subjected having their vehicles seized with impunity because of a facially inconsistent VIN. Once an officer certifies that a vehicle is legitimate and the vehicle is assigned its new identification number, the presumption is that the vehicle consists of legitimate parts.

Additionally, the Court cannot determine as a matter of law that Plaintiffs consented to the search of their vehicle. For purposes of this motion, it appears that Defendants lacked probable cause to search the vehicle. Therefore, the Court will not consider any evidence gathered during the search to justify the reasonableness of the seizure. In any event, the Court determines that what Searcy actually told Norris is in dispute.

Defendants also argue that the determination of the judge in the seizure hearing breaks the chain of causation and insulates a party from liability. Defendants rely on *Wheeler v. Cosden Oil and Chem. Co.*, 744 F.2d 1131, 1132 (5th Cir. 1984) (holding that when magistrate issues a warrant the chain of causation is broken). However, the Supreme Court subsequently adopted a position contrary to *Wheeler*. *Malley v. Briggs*, 475 U.S. 335, 344-45 & n.7 (1986) (specifically rejecting the proposition that a judge's issuance of an arrest warrant broke the chain of causation so that a claim for false arrest could not be maintained against the arresting officer); *see also Hamrick v. City of Eustace*, 732 F. Supp. 1390, 1396-97 & n.3 (E.D. Tex. 1990) (same). "The officer then cannot excuse his own default

by pointing to the greater incompetence of the magistrate." *Malley*, 475 U.S. at 346 n.9 (1986) (holding officers are entitled only to qualified, not absolute, immunity).

Regarding the state law claims against Defendants, they are entitled to official immunity if they are performing discretionary duties within the scope of their authority and are acting in good faith. *City of Lancaster v. Chalmers*, 883 S.W.2d 650 (Tex. 1994). The Court determines that sufficient evidence exists to find that Defendants were not acting in good faith. Therefore, the motion on this ground is denied.

As a final matter, Towe objects to numerous conclusory statements regarding the reasonableness of their search and Defendants' truthfulness in general. Towe also objects to certain statements that he contends are hearsay or not supported by proper foundation. The Court does not consider it necessary to rule on these objections because it is undisputed that Defendants were aware of the facially valid 68-A form. Plaintiffs should be allowed to proceed with discovery to further develop their case.

It is therefore **ORDERED** that the Motion for Summary Judgment, filed by Defendant Jay Norris, on April 10, 1996, is denied.

It is **FURTHER ORDERED** that the Motion for Summary Judgment, filed by Defendant Jim Towe, on April 22, 1996, is denied.

It is **FURTHER ORDERED** that the Motion for Summary Judgment, filed by Defendant Olen Manning, on April 12, 1996, is granted.

It is **FURTHER ORDERED** that the Motion to Strike Summary Judgment Affidavits filed by Defendant Jim Towe, on May 29, 1996, is denied.

It is **FURTHER ORDERED** that Plaintiffs' claims against Defendant Olen Manning are dismissed with prejudice.

Signed this 2nd day of October, 1996.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX
D

§ 501.003

(18) "Serial number" means a vehicle identification number that is affixed to a part of a motor vehicle and that is:

(A) the manufacturer's permanent vehicle identification number;

(B) a derivative number of the manufacturer's permanent vehicle identification number;

(C) the motor number; or

(D) the vehicle identification number assigned by the department.

APPENDIX

E

§ 501.158. Seizure of Stolen Vehicle or Vehicle With Altered Serial Number

(a) A peace officer may seize a vehicle or part of a vehicle without a warrant if the officer has probable cause to believe that the vehicle or part:

(1) is stolen; or

(2) has had the serial number removed, altered, or obliterated.

(b) A vehicle or part seized under this section may be treated as stolen property for purposes of custody and disposition of the vehicle or part.

No. 97-1875

Supreme Court, U.S.
FILED
AUG 3 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

A.J. WREN and JERRY WREN,

Petitioners,

vs.

JIM TOWE and JAY NORRIS,

Respondents.

On Petition for Wrt of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JAY NORRIS

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QUESTION PRESENTED

Whether the Court of Appeals properly reversed the district court's denial of the defendants' motion for summary judgment on the basis of qualified immunity and remanded the case to the district court to render judgment in favor of the defendants, granting them qualified immunity.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding, except as to the following addition:

W. Wendell Hall, *Counsel for Defendant-Respondent*

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STATEMENT OF THE CASE

Jay Norris, a member of the International Association of Auto Theft Investigators and the Texas Association of Vehicle Theft Investigators, has been a member of the Dallas FBI Auto Theft Task Force since mid-1994. Prior to this, he retired from the Louisiana State Police as a Master Trooper in 1993 with credit for more than twenty years of service. Norris was a commissioned Special Ranger at the time the investigation began and at the time of Towe's seizure of the Wrens' vehicle.[1] He has taught various courses in auto theft, prevention and investigation at the Louisiana State Police Academy and at various other academies throughout Louisiana.

In January 1995, Norris inspected a truck in the parking lot while instructing a course on basic auto theft at the Arlington Regional Police Academy. The truck did not have a dashboard vehicle identification number ("VIN") on it and a computer database search of the truck indicated that although it was registered to a dealer, it did not have dealer plates, was not on a sales lot, and did not have a for sale sign on it. Absence of a dashboard vehicle identification number suggested possible criminal activity. Through a database inquiry of the license plates, Norris obtained registration information for the truck, as well as information that the truck was totaled and/or salvaged at one point. However, the truck looked almost brand new.

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1. "A special ranger is subject to the orders of the [Texas Public Safety C]ommission and the governor for special duty to the same extent as other" Texas Department of Public Safety Officers. TEX. GOVT. CODE § 411.023(b) (Vernon's 1990). Article 2.12(4) of the Texas Code of Criminal Procedure states that "rangers and officers commissioned by the Public Safety Commission and the Director of the Department of Public Safety" are peace officers. TEX. CODE OF CRIM. PROC. art. 2.12(4) (Vernon 1990). As defined by statute, Norris is a peace officer. He also was certified under the Texas Commission on Law Enforcement Officer Standards — Education. *See* TEX. GOVT. CODE §§ 415.001-415.123 (Vernon's 1990).

Norris then contacted the original owners of the vehicle, the McGees, who explained that their truck had been stolen and burned. Norris also obtained from the McGees' insurance company a copy of the claim file which confirmed that this vehicle had been stolen, burned and totaled. Texas Department of Public Safety Sgt. Walter Degner was then asked to inspect the truck. Degner was advised that Texas Custom Trucks was in the chain of title of this vehicle. Degner was familiar with Texas Custom Trucks and was aware that its activities had been under review by members of the Dallas FBI Auto Theft Task Force. From other members of the Dallas FBI Auto Theft Task Force, it was learned that Texas Custom Trucks was Randy Brown's business name. Brown was a narcotics informant for Lt. Paul Pothen of the DeSoto, Texas Police Department. Lt. Pothen was a narcotics officer whose signature appeared on the Texas Department of Transportation Form 68-A which certified that the vehicle was a legitimate, reconditioned vehicle. However, the absence of a VIN plate and the peculiar circumstances surrounding the Form 68-A led Norris to continue his investigation. DOT Form 61, which Norris located on this vehicle, revealed that the cab of the truck at one time belonged to William Searcy.

Searcy told Norris that his deceased father had left him a 1989 Chevrolet truck, which he later wrecked. GMAC was the lien holder on this vehicle. Searcy said he had removed the dashboard VIN plate from the cab. He described in detail extensive damage to the undercarriage of the cab with the roof and driver's side door having been caved in almost completely. He also stated that the doors of the truck were sold to a third party whose name he could not remember. Searcy further stated that GMAC had repossessed what was left of the truck, and he had lost it all.

Conversations with GMAC representatives did not confirm this story. In fact, GMAC stated that they had not repossessed

this vehicle and that their lien to secure payment of the vehicle was never paid. From this, Norris determined that Searcy may have sold and/or transferred secured property in violation of TEX. PEN. CODE § 31.03.

Searcy also gave Norris certain "identifiers" to confirm that what he might be looking for was the cab which Searcy had at one time owned. Searcy explained and drew a diagram for Norris depicting the locations of marker lights on the top front of the cab and opera lights he had installed at the side window of the cab. In a subsequent conversation, Searcy confirmed what he initially stated except that he was uncertain about removing the dashboard VIN tag.

On March 16, 1995, Norris and Texas Department of Public Safety Sgt. Jim Towe located the current owner of the truck, Jennifer Wren. Mrs. Wren confirmed that she was the owner of the vehicle and consented to an inspection. Prior to the inspection, Mrs. Wren called her husband, who also consented to an inspection, provided that it was made somewhere other than the parking lot of his wife's employer. An inspection of the truck revealed:

- The vehicle had no evidence of ever having marker or opera lights where Mr. Searcy said he had them on his cab;

- There was no evidence of fastener holes where the clearance and opera lights described by Searcy should have been located;

- The VIN tag on the driver's door matched the VIN for Searcy's cab, which was confusing, since Searcy informed Norris that he had sold the doors independent of the cab;

- Contrary to what Searcy had related, there was no evidence that the vehicle had ever sustained serious roof or undercarriage damage; it was evident, however, that the driver's door had been straightened and repaired;

- The VIN sticker, usually found in a vehicle's glove compartment, was missing;

- Throughout the vehicle, numerous parts were observed with older year dates than that of the vehicle; another factor indicating the possibility of illegal activity. R. 79-80.

Article 6687-1 § 49(c) of the Texas Revised Civil Statutes (now codified at Section 501.158 of the Texas Transportation Code) authorizes a peace officer to seize a vehicle if the officer has probable cause to believe that the vehicle or part of the vehicle has had the serial number removed, altered or obliterated. In addition, Norris and Towe did not find damage to the truck consistent with the damage reported by Searcy, nor were they able to confirm an identification using the light "identifiers" given by Searcy. It appeared, at this inspection, that the cab in question was not Searcy's cab, although the title trail reflected that it should be. Moreover, it appeared that the Texas DOT Form 68-A was executed under suspicious circumstances. A narcotics officer (not an auto theft investigator) signed the document for his informant. Towe agreed that further investigation was necessary and that seizure of the vehicle for that purpose would be appropriate under article 6687-1 § 49(c) (now codified at TEX. TRANS. CODE § 501.158) and TEX. CODE OF CRIM. PROC. art. 47.01 *et seq*. After more than two months of investigation, Sgt. Towe actually "seized the vehicle" in the name of the Dallas FBI Auto Theft Task Force and gave the Wrens a receipt for the seized truck. Pursuant to article 47.03,

Defendant Jim Towe filed a schedule for the Wrens' truck on the day of its seizure.

Several days after the seizure, Norris and Towe again examined the vehicle and were able to determine that the vehicle had been "de-identified". The inspection was to search for confidential VINs placed on component parts by manufacturers for use by law enforcement. Some of the confidential VINs placed were removed or obliterated which was inconsistent with a legitimate rebuild. This gave the defendants additional reasons to believe that the vehicle, or at least parts of it, were stolen.

Pursuant to Texas Code of Criminal Procedure article 47.01 *et seq.*, a hearing was held before Magistrate Roy Kurbin concerning the truck. Officers Norris and Towe and expert Michael Greer testified that probable cause supported seizure of the Wrens' truck and that law enforcement's actions were objectively reasonable and did not violate clearly established law. The Wrens did not controvert or dispute this direct testimony. Similarly, it is undisputed that the cab of the Wren vehicle was taken from Searcy's truck (Searcy purchased the truck from his father by agreeing to take over the payments to GMAC). GMAC held the lien on the truck. It is undisputed that Searcy wrecked the truck and later sold the cab and other parts of the truck to Donnie Thomas. Norris spoke to GMAC concerning the Searcy vehicle and was advised their lien was never paid. From this, Norris determined that Searcy may have sold and/or transferred secured property in violation of TEX. PEN. CODE § 31.03. These facts were not controverted.

At the hearing, a private investigator appeared on behalf of the Wrens and produced pictures of Searcy's truck. From the pictures it was evident that the damage depicted was not consistent with what Searcy had described to Norris. Following examination of these pictures, Norris conducted another

examination of the vehicle and was able to locate the details depicted in the pictures. Following this examination, the Dallas FBI Auto Theft Task Force confirmed that the cab probably was Searcy's.

After hearing the evidence, including the Wrens' story, Magistrate Kurbin awarded the vehicle to the Dallas FBI Auto Theft Task Force pursuant to article 47.01a(b) (providing that if probable cause exists to believe that the property was acquired by theft or by another manner that makes its acquisition an offense and the identity of the actual owner of the property cannot be determined, the court shall order a peace officer to deliver the property to a government agency for official purposes). The Wrens appealed to the Tarrant County Court at Law pursuant to article 47.12(b). Subsequently, an agreed Order was signed returning the truck to the Wrens.

The Wrens later sued Norris alleging that he acted under color of law in allegedly violating their constitutional rights. It is undisputed that all actions taken by Norris were done as a member of the Dallas FBI Auto Theft Task Force. Consequently, Norris is a "government official" for purposes of qualified immunity.

REASONS FOR DENYING THE WRIT

Qualified immunity

> shields government officials performing discretionary functions from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). Qualified immunity

is an immunity from suit, not simply a defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1995). The purpose of qualified immunity is to shield law enforcement officers from the burdens of defending lawsuits which arise from the good-faith performance of their duties. *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991). It protects government officials "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990) (citing *Anderson*, 483 U.S. at 638). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 241 (1986). Thus, if reasonable public officials could differ on the legality of a defendant's actions, the defendant is entitled to immunity from suit. *Pfannstiel*, 918 F.2d at 1183. Accordingly, the issue of qualified immunity should be resolved at the earliest stage on the basis of the pleadings and limited discovery. *Id.*

The heart of the Wrens' complaint is that they believe that their perception of the facts at the time of the seizure should control the outcome of the defendant's motion for summary judgment based upon qualified immunity. The Wrens argue at length as to what they believe the facts demonstrated at the time of the seizure of the truck. That is not the test. Rather, the court must inquire into the "objective legal reasonableness" of an officer's actions. *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996). As this Court has stated, it is *the information known at the time of the seizure and the reasonability of the inferences drawn from such information* which is the key. *Hunter v. Bryant*, 502 U.S. 224, 27-28 (1991); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

I.

THE WRENS WRONGLY COMPLAIN THAT ACTUAL PROBABLE CAUSE IS THE TEST.

As the Court of Appeals noted, the existence of probable cause is not the appropriate issue when determining whether qualified immunity is applicable. The issue is whether the conduct of the government official was objectively legally reasonable. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Law enforcement is not liable if they "reasonably but mistakenly conclude that probable cause is present." *Id.* Consequently, the seizure of the Wrens' truck is deemed "objectively reasonable" unless "there *clearly* was no probable cause at the time the . . . [seizure] was made." *Topp v. Wolkowski*, 994 F.2d 45, 48 (1st Cir. 1993) (emphasis original). Only when there *clearly* was no probable cause is qualified immunity pierced. *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985). The issue simply is whether probable cause was "at least arguable." *Id. See also Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (citing and quoting the *Floyd* "arguable" probable cause standard); *Lindsey v. Storey*, 936 F.2d 554, 559 (1991) (adopting an "arguable" reasonable suspicion standard for a *Terry v. Ohio*, 392 U.S. 1 (1968)-type seizure). The reason for the "arguable" probable cause standard is because law enforcement should not always err on the side of caution for fear of being sued. *Hunter v. Bryant*, 502 U.S. at 229.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT THE WRENS' COMPLAINT THAT THE SEARCH WAS ILLEGAL DOES NOT END THE INQUIRY.

The Court of Appeals correctly held that the district court erred in concluding that because probable cause apparently was lacking it "[would] not consider any evidence gathered during

the search to justify the reasonableness of the seizure." The court noted that the Supreme Court has never applied the exclusionary rule to state or federal civil cases. Pet. App. at 8 (citing *City of Waco v. Bridges*, 710 F.2d 220, 225 (5th Cir. 1983)). The Court of Appeals observed:

> The rationale behind the exclusionary rule is "to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," and application of the rule "is restricted to those areas where its remedial objectives are thought to be most efficaciously served."

Pet. App. at 9 (quoting *United States v. Janis*, 428 U.S. 433, 446-47 (1976) (citation omitted)). Accordingly, based on the deterrent rationale and the precedent, the Court of Appeals correctly found that there was no reason to ignore and exclude the evidence found in the truck. Pet. App. at 9. Furthermore, as the court recognized, Texas Transportation Code § 501.158 permits the seizure of a vehicle with a missing VIN sticker without a warrant. Consequently, the law does not require the exclusion of evidence because of a lack of a warrant. Pet. App. at 9.

Based upon the information known before and after the search of the truck, the evidence is undisputed that Norris' belief that something illegal was happening was reasonable. As this Court has stated, it is *the information known at the time of the seizure and the reasonability of the inferences drawn from such information* which is the key. *Hunter v. Bryant*, 502 U.S. 224, 27-28 (1991); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Again, the issue is not whether Norris had probable cause to seize the truck. Pet. App. at 11.

III.

AFTER AN EVIDENTIARY HEARING, A MAGISTRATE FOUND PROBABLE CAUSE TO SEIZE THE TRUCK.

A magistrate's determination that probable cause existed is entitled to great deference and should be sustained even if the determination is doubtful or marginal. *United States v. Fooladi*, 703 F.2d 180, 183-84 (5th Cir. 1983). Furthermore,

> where the state affords an opportunity for an accused [or an interested person as defined by article 47.01a] to contest probable cause at a preliminary hearing and the accused does so, a finding of probable cause by the examining magistrate or state judge should foreclose relitigation of that finding in a subsequent § 1983 action.

Coogan v. City of Wixom, 820 F.2d 170, 175 (6th Cir. 1987). It is undisputed that the Wrens as well as their private investigator were present and heard at the April 14, 1995 hearing. Nevertheless, Magistrate Kurbin found probable cause and awarded the vehicle to the F.B.I. Task Force. "[P]roof of the actual existence of probable cause is an absolute bar to the 1983 action [regardless] of the lack of good faith of the arresting police officer." *Williams v. Kobel*, 789 F.2d 463, 470 (7th Cir. 1986) (quoting *Moore v. Marketplace Rest. Inc.*, 754 F.2d 1336, 1344 n.10 (7th Cir. 1985)); *see also Hubbert v. City of Moore, Oklahoma*, 923 F.2d 769, 773 (10th Cir. 1991) (explaining that when probable cause is fully and fairly litigated at a preliminary hearing or an examining trial, it cannot be relitigated in a subsequent § 1983 action).

After an evidentiary hearing at which all parties were present and heard, Magistrate Kurbin found probable cause and properly

awarded the vehicle to the Dallas F.B.I. Auto Theft Task Force. The district court erred in failing to give this determination the great deference to which it is entitled. The district court further erred in failing to recognize that probable cause already was determined after an evidentiary hearing pursuant to article 47.01a of the Texas Code of Criminal Procedure. Because probable cause was found after an evidentiary hearing, it cannot be relitigated in this § 1983 action. At the very least, Magistrate Kurbin's finding of probable cause means that the existence of probable cause at the time of seizure is arguable. Consequently, Norris is entitled to immunity from this suit on the basis of qualified immunity.

IV.

THE DISTRICT COURT ERRONEOUSLY RELIED ON *BIGFORD II*.

In concluding that probable cause "appeared" to be lacking, the district court relied upon *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir.), *cert. denied*, 488 U.S. 851 (1988) (*Bigford II*). In *Bigford II*, law enforcement officers seized a truck and the owner of the truck filed a civil rights claim. The suspicions of the sheriff's deputy turned out to be unjustified. Yet, at the time the deputy cited the following reasons to support his suspicions: the Federal Inspection Safety sticker was missing from the door, the rivets affixing the VIN plate to the dash appeared to be tampered with, the truck's body did not appear to match its frame, and the he could not find the VIN stamped on the engine. *Id.* at 1215-16. Further, the deputy used a computer database and found that the truck was never listed as stolen. Also, the plaintiff established a clear chain of title from the original owner. Nevertheless, the truck was seized, held in an impound lot for three years, and then destroyed by a hurricane. *Id.* at 1216-17. The Court of Appeals found that the plaintiff's rights were

violated, that no probable cause existed, and remanded the case. *Id.* at 1223. Erroneously relying on *Bigford II*, the district court stated that "seizure based *solely* on a missing VIN is objectively unreasonable." (emphasis added).

As the Court of Appeals noted, in *Bigford v. Taylor*, 896 F.2d 972 (5th Cir. 1990) ("*Bigford III*"), the court undertook the second part of the analysis and examined the issue of qualified immunity. In *Bigford II*, the court did not expressly discuss qualified immunity. *Bigford III*, 896 F.2d at 975. Observing that the probable cause standards for reasonableness differ from those of qualified immunity, the court concluded that the deputy was entitled to immunity from liability. *Id.* at 975.

Unlike the deputy in *Bigford III* who was entitled to qualified immunity, Norris had far more reasons to be suspicious of the nature of ownership of the Wrens' truck. As the court pointed out, Norris knew that the VINs were missing, that the truck was registered to a dealer, that the truck's immaculate condition did not match its damage record, that the truck was reported stolen, that the truck was sold with a lien on it, that the Form 68-A was suspicious, and that the truck was linked to an illegal chop shop. Pet App. at 13. While the facts were subsequently explained, at the time of the seizure Norris' suspicion based on the facts was not unreasonable. *Id.* The Court of Appeals correctly found that Norris was entitled to immunity.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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FILED
AUG 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1875

In The

Supreme Court of the United States

October Term, 1997

A.J. WREN and JERRY WREN,

Petitioners,

vs.

JIM TOWE and JAY NORRIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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10 pp

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ARGUMENT

I. THE RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI CONFIRMS THE NEED FOR THIS COURT TO GRANT THE WRIT OF CERTIORARI

Respondent Norris' Brief in opposition is actually the best argument for this Court to grant the Writ of Certiorari. Virtually all the facts that Norris has placed in his "statement of facts" were not admitted as true or accurate by the Petitioners but rather were hotly contested by them. In response to Norris' and Towe's Motion for Summary Judgment wherein they claimed entitlement to qualified immunity, the Petitioners presented evidence that challenged the truthfulness of Towe's and Norris' assertions and/or contradicted Norris' and Towe's basis for the seizure of the Wrens' truck and the Respondents' claims to immunity. E.g. (the following examples should not be considered to be inclusive):

> A. In the summary judgment proceeding the Petitioners presented affidavits that demonstrated that there was observable evidence of the repair to the truck body including the body damage related to the removal of opera lights, etc. Towe and Norris told Justice of the Peace Kurbin that they had removed the "headliner" from inside the cab and found no evidence of holes left by the removal of the opera lights, etc. This claim was disputed by the Petitioners and the Petitioners' evidence was that a removal of the headliner would evidence repair of the damage caused by the removal of the opera lights, etc. Towe and Norris also claimed that they found no evidence of repair to the left floor of the truck. Jennifer Wren testified that she

observed Norris on the day of the seizure pull back the carpet on the left floor of the truck and observe obvious evidence of repaired damage.

B. Petitioners presented an affidavit from a former owner of the cab (Searcy) that was placed by the reconditioner on the Wren's truck. Searcy denied telling Norris that he sold the doors to this cab independent of the cab. Searcy denied telling Norris anything that was actually inconsistent with the cab's condition as it existed on the Wren truck. Searcy denied telling Norris anything about a GMAC repossession. In his affidavit Searcy also said that he showed Norris several photos taken of his truck before he sold the cab. These photos were the same ones Norris saw in the possession of a private investigator at the hearing before the Justice of the Peace on April 14, 1995. The implication of Norris' refusal to acknowledge that he had seen these photos before the hearing or the seizure was clear because they were not consistent with his plans to seize the Wren truck on March 16, 1995.

C. The Petitioners' evidence was that, with the exception of the use of Searcy's cab in the construction of the Wren's truck, there was no parts bearing "older dates".

D. The Petitioners presented evidence that there were no confidential VIN's and that there were no "confidential VIN's" removed or obliterated from the truck as Norris and Towe claimed.

Respondent Norris says the heart of the Wren's complaint is that the Wren's perception of the facts should control the outcome of Norris' application for summary

judgment. This is not the Wrens' position. The Wrens' position is that when facts supporting "probable cause" or even "arguable probable cause" or "qualified immunity" are contested, the Defendants and the Courts should not be able to ignore Rule 56 criteria and ignore facts that challenge the credibility of the applicants for qualified immunity. The Petitioners also state that the Court of Appeals should not be able to make factual findings while ignoring evidence that would not support its finding of qualified immunity.

The evidence viewed in a light most favorable to the opponent (here, the Wrens) in accordance with the requirements of Rule 56 Fed. R. Civ. P. established that the Wrens owned a truck that had been lawfully constructed (reconditioned) from parts primarily obtained from two trucks that were legitimately purchased and not stolen. The Wrens' truck had been inspected and cleared for evidence of illegal conduct by a law enforcement officer in March, 1994. This officer found no evidence of use of stolen parts and/or illegal conduct. Subsequent to the inspection the truck had been declared eligible by the State of Texas to be issued a new title and a new serial number. That the new serial number was issued because there were missing or obliterated VIN's (on the cab obtained from Searcy). The new serial number was placed in the driver's side door jamb and this number had not been tampered with in any manner. This new serial number replaced the VIN as the official serial number for the Wren truck. The Petitioners' evidence showed that long before their seizure Norris and Towe knew all of

these facts and that neither Norris nor Towe had discovered anything that was inconsistent with these facts. Further, the evidence showed that prior to their seizure, neither Norris nor Towe had uncovered anything that tended to show that the officer (Lt. Pothen) who inspected the Wrens' truck in March 1994, had done anything improper. Nor did Norris or Towe uncover any evidence that showed that the Wrens' truck had been constructed with stolen parts. An affidavit from Searcy (the former owner of the cab) disputed virtually everything Norris attributed to him. The Petitioners presented evidence that there were no missing "confidential VINs" and that encountering a motor vehicle with "missing VINs" is not really an uncommon occurrence. (E.g., the driver's side door on a Chevrolet truck has a VIN on the door. If this door is replaced due to damage, a new Chevrolet replacement door would have no VIN leaving the vehicle with a missing VIN.) The evidence viewed in proper Rule 56 perspective was also that the Petitioners' truck came to the attention of the Respondents on January 17, 1995, almost a full two months before the seizure of the truck on March 16, 1995; that Respondents had no warrant; that there was no exigent circumstance; and, that after the Respondents seized the truck, Towe filed a conclusionary affidavit devoid of any factual basis to justify the decision to seize. There is no dispute that the Petitioners were deprived of their vehicle from March 16, 1995 until August 23, 1995. The Petitioners' evidence was that if one gave all benefit of any doubt to Norris and Towe, it would not have taken more than an hour to conduct a very thorough inspection of the truck to confirm that it was what it was, a legitimate truck. The

Petitioners' evidence was that Towe and Norris lied to the Justice of the Peace on April 14, 1995 to cover up their realization that the vehicle was indeed legitimate and that they should not have seized it.

II. THE RESPONDENTS ARE NOT ACCURATELY PORTRAYING STATE LAW

In their brief the Respondents contend that Justice of the Peace Kurbin's determination of the seizure, etc. prohibits any re-examination of this issue. This is not an accurate statement of the law in Texas. Under Texas law, appeals under Texas Code of Criminal Procedure Chapter 47 are governed by the Texas Civil Rules pertaining to appeals from Justice Courts. Under Texas law such an appeal is a "de novo" matter meaning that all of the issues are retried in the County Court as if nothing had been determined in the Justice Court. Because the Petitioners appealed Justice of the Peace Kurbin's decision to award the truck to the State of Texas and because the Texas Attorney General, on behalf of the State of Texas, consented to an entry of a judgment in the County Court on August 23, 1995 returning the Wrens' truck to them, Justice of the Peace Kurbin's determinations have no binding legal meaning or effect. By entry of this County Court judgment, the clear implication is that Towe and Norris acted improperly. (See Tex. Code of Crim. Proc. Art. 47.12(b) and Tex. Rules of Civ. Proc. Rule 591.)

III. THE COURT OF APPEALS IMPROPERLY DETERMINED THAT THERE WAS "ARGUABLE" PROBABLE CAUSE

Because Norris and Towe had ample time to investigate and an ample amount of time to obtain a warrant (i.e., from January 17, 1995 until March 16, 1995) Norris' and Towe's decision to seize should have been governed by the same criteria as if Norris and Towe had actually sought and obtained a warrant. *See Malley v. Briggs*, 475 U.S. 335 (1986). The Supreme Court's summary disposition in *Hunter v. Bryant*, 502 U.S. 162 (1991) appears to the Petitioners, to have encouraged the Court of Appeals to reach out and find qualified immunity for officers who are not entitled to its protection.

No factors requiring any sort of immediate action on the part of either Towe or Norris were presented by their decision to seize. (Important considerations such as an arrest to avoid potential injury to the President of the United States were not present.) The evidence in this cause, viewed in a light most favorable to the Petitioners, was that the seizure of the Petitioners' truck was not done because of a need to seize but rather to further a dispute between another member of the same Task Force that Towe and Norris were members and the officer who inspected the Wrens' truck in 1994. (See recitation of these matters in the District Court's Opinion found in the Appendix to the Petitioners' Brief. See App. pp. 22-24.)

If there is such a thing as "arguable" probable cause as the Respondents' claim, and as Court of Appeals appears to accept in principle, if not by the use of this terminology, the Supreme Court should accept this case

for consideration in order to give guidance and direction as to how to know when "arguable" probable cause exists and when "arguable" probable cause should be applied to the determination of qualified immunity. Additionally, the Supreme Court should determine how to handle the evidence regarding "arguable" probable cause within the confines of Fed. R. Civ. P. Rule 56.

CONCLUSION

For the foregoing reasons in addition to the matters presented in their petition, A.J. and Jerry Wren request that their petition for a writ of certiorari be granted and that a writ of certiorari be directed to the United States Court of Appeals for the Fifth Circuit and that after hearing and consideration, that this Court then reverse the decision of the Court of Appeals and remand this cause to the District Court for trial.

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